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LEGITIMACY AND MARRIAGE.

A CHILD'S relation to his parents may be regarded from the standpoint of morality or from the standpoint of law. He is a member of a family, physically connected with his father and mother, and the respective rights and duties of parent and child are a matter of elementary morality. If the parent's duty to care for his offspring has been fully recognized only within a comparatively recent past, the duties of parents have always been urged by natural affection, and the liberty to refuse to assume paternal obligations, found in some early systems of law, has long since disappeared. But the child and his parents are members of an organized community, and their respective rights and duties, arising from their position in that community, are regulated by law, which for reasons of its own has limited natural rights, requiring for the legal recognition and enforcement of those rights certain conditions precedent. And it has also created rights not derived from the simpler ideas of natural rights, but finding their justification in the necessities of a complex society. It has even made it possible for mutual rights and duties to arise between persons not related as parent and child, identical with those founded upon a natural relation. There is, accordingly, a clearly marked distinction between what might be called a child's natural or moral rights and his legal rights. It is in connection with the latter class of rights that the notion of legitimacy arises, a notion entirely distinct from the notion of paternity and filiation, however closely it may be connected with it.

The principal legal difference between a legitimate and an illegitimate child is that, in general, only the former is capable of inheriting either from an intestate father or through a father deceased. He cannot inherit name, titles, or honors from or through his father. For all purposes of inheritance he is a *filius nullius*. If, therefore, his father leaves legacies to each of his children merely describing them as such, and does not specially describe the bastard, the latter would not receive it under the designation "child," even though the parentage was well known and acknowledged by the father. Other disabilities which have been recognized by law are less fundamental and have not been due to any

profound legal principle, but rather to the disrepute of bastardy. But though a bastard is, in general, a *filius nullius* in respect to inheritance, he is not a *filius nullius* in every respect. For he has a right of support, or alimentation, from his natural father; and although in modern systems of law a new reason for the enforcement of this right has been found in the prevention of the bastard's becoming a public charge, the principle underlying this right has long been recognized.¹ Again, illegitimate children themselves may have very different powers and capacities in both Civil and Canon Law, according to the relation of their parents to each other. If born of incest or adultery, they do not have the rights as to legitimation which would have been theirs if they had been born of *fornicatio simplex*. If their mother is a *concubina in domo recepta*, they might be regarded as in a still more favorable position.² The contradiction in the law whereby an illegitimate child may be a *filius nullius* in some respects, and not a *filius nullius* in other respects, raises the question as to the historical origin of the distinction between legitimacy and illegitimacy. The question appears the more important when it is recalled that the difference between a bastard and a lawful issue is due, in general, to the existence of a marriage between the latter's parents. What is there in marriage to give rights to offspring which otherwise would not have been theirs? The exceptions to the rule requiring marriage only render the question more interesting.

The traditional explanation³ of the familiar rule concerning legitimacy, *pater est quem nuptiæ demonstrant*,⁴ is, that since it is necessary that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied upon as determining the heir. But this rule, which has passed into probably all modern systems of jurisprudence, merely raises a presumption, according to the Civil Law, only if the child was born at least six months after the marriage was contracted⁵ and not more than ten months after its dissolution.⁶ Even within these limits there was no conclusive presumption, for proof to the

¹ Cf. Hostiensis, *Summa aurea*, Basilæ, 1572, p. 1096, ad X. *qui filii sint legitimi*, 4, 17; Panormitanus, *Commentaria super libros Decretalium*, Lugduni, 1555, IV. 40 b, ad c. 6, X. 4, 17.

² Panormitanus, l. c.

³ *E. g.* Nov. 89, 1, 1. Cf. Puchta, *Pandecten*, § 41.

⁴ D. 2, 4, 5.

⁵ D. 1, 5, 12; 38, 16, 3, 12.

⁶ D. 38, 16, 3, 11; C. 6, 29, 4.

contrary was not excluded.¹ All this passed into the Canon Law and has been widely accepted. Even the extravagant extension which the rule obtained in England in the Common Law has been abandoned in favor of a position similar to that in the Civil Law. It would appear then that paternity and filiation was the essential point, and that marriage was evidence, though by no means conclusive, of paternity.

But not so. For, although in the case of children born of a lawful concubine,² *liberi naturales*, as distinguished from *spurii*, *adulterini*, *vulgo quæsit*i, etc., paternity could be proved, and in course of time such children, just because paternity and filiation was certain, obtained some limited advantages in respect to alimantation and succession, they were, nevertheless, illegitimate because there was no marriage. But if, as was the rule from the time of Constantine,³ the parents subsequently married each other, with certain specified formalities designed to facilitate proof, the *liberi naturales* became *liberi legitimi*, and this result evidently depended upon a certainty of paternity in the case of concubinage equal to that in the case of marriage. It follows that marriage was much more than a means of ascertaining paternity; there was something attaching to the notion of marriage which was regarded as the basis of this very different notion,—legitimacy. The inquiry is thus thrown back to a period in which the notions of marriage and of legitimacy were more closely connected and in which the family constitution was more clearly defined.

In the Civil Law a child inherited from his intestate father, not because he was related to him by blood, but because he was a *filiusfamilias* or in the *potestas* of a *paterfamilias* at the time of the latter's death. If he ceased to be *in potestate*, *i. e.* ceased to be a *filiusfamilias*, and this might happen in case of a change of status or *capitis diminutio*, *e. g.* by emancipation, he lost his rights of succession.⁴ He might by a legal transaction even become a *filiusfamilias* in another family than that into which he

¹ D. 1, 6, 6; 25, 3, 1, 14; *cf.* D. 22, 3, 29; 48, 5, 12, 9.

² *Cf.* X. *qui filii sint legitimi*, 4, 17, and the comment of Hostiensis, *op. cit.*; Durandus, *Speculum Juris*, Francofurti, 1592, III. 446; and Panormitanus, *op. cit.* especially, ad c. 2, eod. tit. IV. 38, b.

³ D. 25, 7; C. 5, 26; 5, 27.

⁴ C. 5, 27, 5.

⁵ D. 4, 5, 3, 1. In the later law (A. D. 502), however, by an *emancipatio Anastasiana* his rights of succession might be retained. C. 6, 58, 11. But this was after the law had long since undergone a transformation in respect to succession.

had been born.¹ Marriage was merely the condition on which children begotten by a *paterfamilias* were in his *patria potestas*, and it had this in common with adoption or arrogation, that it was a means of acquiring, at least in early law, a sort of ownership. In the early marriage, the wife passed into the *manus* of her husband, and it would appear that her children would be born into the same *manus* or *potestas*.² The *filiusfamilias*, not begotten but acquired by adoption or arrogation, came into the *patria potestas* by a ceremony strikingly similar to one form of marriage,—*coemptio*. It was a conveyance *per æs et libram*.³ But the foundation of legitimacy is not to be found in the relation of ownership in which the *paterfamilias* stood to his wife. For though the child of an *ancilla*, who was herself just as much *in potestate* as was a *filia familias*,⁴ belonged to her owner, because of his right in her, yet the child of an *ancilla* was not a *filiusfamilias* even if begotten by the *paterfamilias* himself.⁵ Why should the children of one woman have privileges as to succession denied the children of another woman placed in a similar relation of dependence, although the father of all the children might be the same person? Why should marriage make such a distinction?

The legal rights of the *filiusfamilias* are not to be derived from the *manus* or *patria potestas*, however closely they may be connected in Roman law of the historical period, but from the primitive constitution of the family, *i. e.* of a time anterior to the application to domestic relations of terms and notions derived from a developed law of property. That constitution was that of a quasi-religious corporation in which the ancestral rites were perpetuated and offerings made to the *manes*. That such a constitution of the family, resting not upon legal conceptions but upon non-juristic ideas, had been developed very early in the Latin race is one of the surest conclusions of comparative jurisprudence. Identical conceptions are found in Rome, Greece, and

¹ D. i, 7, 1.

² From the terms *emancipatio*, *mancipium*, etc., it is evident that *manus* had been once applied to other relations than marriage, covering, in fact, different cases of ownership. Further the *manus* in the case of the marriage of a *filiusfamilias* belonged to his *paterfamilias*, and in the case of a dissolution of a marriage by divorce, the *manus* remained with the former husband until it was conveyed to some one else. Cf. Gai., Inst. i. 137, a.

³ Gai., i. 134. For the conveyance with brass and balances, see Gai., i. 119 f.

⁴ Gai., i. 52, 125; the wife *in manu* was *in loco filiae*, Gai. iii. 3.

⁵ D. i, 5, 24; cf. J. i, 3; 1, 8.

India. In all three lands the succession to property is joined with the perpetuation of the domestic religion. According to Hindu law, "He who inherits the wealth, presents the funeral oblations."¹ According to Roman conceptions, succession to property and the worship of a family ought to be inseparable, and the care of the sacrifices always fall upon him who receives the inheritance.² In Greece the same idea appears, inheritance and the duty of offering the sacrifices are inseparable.³ Marriage, as the act by which the family is founded, is not to provide an heir to property or titles, but one who can carry on the domestic religion.⁴ Because the wife has been associated with her husband in the sacred rites of the household,⁵ and was religiously taken⁶ to perpetuate the religious corporation, her children have a part in the worship and are heirs. But it is not because she has come into the possession of her husband that her children are capable of carrying on the *sacra*, but because of her indissoluble association with her husband in the *sacra*,⁷ because in Roman phrase there has been *divini et humani juris communicatio*.⁸ Even should the husband be unable to beget children, he need not despair of a successor to his rights and duties. A son might be begotten for him upon his wife by a kinsman appointed for that purpose.⁹ Such a son begotten upon the wife ranked highest among the various substitutes for a child begotten by the husband upon his wife. He was capable of inheriting the property and offering the sacrifices to the *manes*. Even if the husband should die without having made provision for a successor, or should have been so long absent that his death seemed probable, the wife might bear him an heir by a near kinsman.¹⁰ The tie common to such cases is the wife's participation in the rites of the family.¹¹ This method of

¹ Institutions of Vishnu, ed. Julius Jolly, Sacred Books of the East, xv. 40; Baudhayana Dharmasastra, ed. Georg Bühler, *ibid.* ii. 2, 3, 18; Vasishtha Dharmasastra, ed. Georg Bühler, *ibid.* xvii. 23; Manu, ed. Georg Bühler, *ibid.* ix. 186.

² Cicero, De legibus, ii. 19, 66.

³ Fustel de Coulange, La cité antique, Bk. ii. ch. 7, § 1.

⁴ Cf. Vasishtha, xvii. 1-5, with quotations and references.

⁵ Apastamba's Aphorisms on the Sacred Law, ed. Georg Bühler, S. B. of the E., ii. 6, 14, 17; ii. 5, 11, 13 ff.; Gautama's Institutes, ed. Georg Bühler, *ibid.* v. 7.

⁶ Cf. Vasishtha, xvii. 72 ff.

⁷ Cf. Apastamba, ii. 5, 11, 12-14; Manu, v. 167 f.

⁸ D. 23, 2, 1.

⁹ Gautama, xviii. 11; xxviii. 32; Vasishtha, xvii. 14; Vishnu, xv. 3; etc.

¹⁰ Gautama, xviii. 4, 15; xxviii. 22 f.; Vasishtha, xvii. 56 ff.; Manu, ix. 144 ff., 190; etc.

¹¹ The levirate marriage among the Hebrews presents many difficulties. As it appears in the Old Testament it is connected primarily with the right of succession.

providing for the succession does not appear in Roman Law, nor do various other Hindu substitutes for natural issue, *e. g.* the appointed daughter whose son should be regarded as the child of his maternal grandfather, which as well as the appointed wife or widow survived in Greece.¹ Adoption, however, which appeared in all Hindu codes, became in Roman Law the only method of supplying the need of some one to continue the family *sacra*, and the adopted son obtained more important rights in Rome than in India, becoming in every respect a *filiusfamilias*. But the purpose of the adoption was to provide a substitute for, and not a rival to, the son begotten by the *paterfamilias* upon his wife.² For in Cicero's time it was still contrary to the immemorial law of adoption to adopt a son when there was already a *filiusfamilias*.³

In the Roman Law traces may still be found of a primitive notion that the capacity of the son to perform sacrifices depended upon the nature of the marriage rites by which his parents had been united. In the Hindu law⁴ the different kinds of marriage rites had determined the abilities of the sons to benefit the deceased ancestors. Some could save more than others, the highest saving ten ancestors, ten descendants, and himself.⁵ These rites were regarded as appropriate to different classes, and in the case of the lowest classes the very inferior rites conferred only a minimum of religious capacity upon the children born of the marriage. With this condition of the Hindu law should be compared the early Roman marriage by *confarreatio*, at one time the only rite whereby *justiæ nuptiæ* could be contracted, the other rites apparently having disappeared. The plebeians to whom *confarreate* marriages were not open, could have no family *sacra*⁶ and therefore no real marriage, *justæ nuptiæ*, or family. Even as late as the Empire sacerdotal capacity, at least in the case of the *Flamen Dialis*, depended upon birth in *confarreate* marriage.⁷

It is a means of retaining the family portion in the same tribe and family. But it may well be based upon some notion similar to that of the Aryan institution. The Hebrew of the Old Testament, however, laid stress upon paternity rather than upon birth in lawful marriage. Cf. Benziger, *Hebräische Archeologie*, p. 135.

¹ Cf. Xenophon, *De repub. Laced.*, c. 1; Plutarch, *Solon*, c. 20.

² *Gai.*, i. 103.

³ Cicero, *De domo sua*, c. 13.

⁴ Cf. Gautama, iv. 15, 6 ff.; Apastamba, ii. 5, 11, 17 ff.; Manu, iii. 23 ff.

⁵ Gautama, iv. 29 ff.; cf. Apastamba, ii. 5, 12, 4; Baudhayana, i. 11, 21, 1.

⁶ Cf. Livy, iv. 2.

⁷ Cf. Tacitus, *Ann.*, iv. 16; *Gai.*, i. 136.

To sum the matter up, the general conception of marriage, its purpose and its effects, common to early Hindu, Greek, and Roman law, was that brought out in the question which, until well into imperial times, the censor put on the occasion of a marriage: ¹ whether a wife was taken for the sake of begetting children; and by the conditions under which an *adrogatio*, or adoption of one who was himself a *pater familias*, could take place. For as the person adopted or arrogated necessarily forsook his own family *sacra*, his ancestors might suffer by his passing into another family and another worship, and to guard against such disastrous consequences, the pontiffs required full proof that there were still living brothers who might continue the sacrifices.² This general conception of marriage, its purpose and effects, does not rest upon legal notions, but is itself the basis of the legal principle. It does not find its explanation in the law, but it explains the law of succession.

A theory of marriage and legitimacy based upon the religious organization of the family, however well it might work in a large homogeneous population, was wholly unsuited to serve as the basis of law in a community made up of such different classes as were to be found from the first in Rome. The patricians alone had family *sacra*, and according to the primitive conception they alone had *iustæ nuptiæ*, and consequently they alone had legitimate children. The plebeians had neither,³ and their family organization was in the eyes of the patricians on that account notably defective. It is very probable that in the matter of marriage and legitimacy, as in the matters of property, the plebeians, who were long denied the employment of those legal forms which rendered family and property rights secure, had created, for themselves at least, a legal system which without the sanctions of law nevertheless rendered family life possible and property rights and succession to a certain extent respected. And a sort of marriage by

¹ Gell., iv. 3; Fest., s. v. *quæso*; Sueton., Jul. Cæs., 52; Val. Max., viii. 7, 4. The same sentiment appeared in Greece: cf. pseudo-Demosth. in Neær., c. 122; Xenophon, Memor., ii. 2, 4; Plato, Legg., vi. p. 773. In all the Hindu codes the same idea occurs repeatedly. They are full of minute directions as to the duties of the "householder" in this respect; and the spiritual benefits to be derived from having sons and grandsons who might continue the sacrifices are described in most extravagant terms.

² Gell., xv. 27, 3. Cf. Savigny, Zeitschr. f. geschichtl. Rechtswissenschaft, ii. p. 401 ff.

³ Cf. the contemptuous language of the patricians in opposition to the proposal of C. Canuleius, Livy, l. c.

habit and repute may have originated among the plebeians at a time when they were shut out from the employment of legal forms, and even before the *usus*¹ marriage was recognized and regulated by law.

To make *justæ nuptiæ* possible for the plebeians, and consequently to give them legitimate children, *i. e. in potestate*, another conception of marriage was substituted for that existing among the patricians, but with the same effect as that underlying the *confarreate* marriage. That conception was ownership, and *coemptio*, or a sort of conveyance of property, in place of initiation was the form under which the plebeian, as soon as legal property rights were granted him, was able to establish a secure marriage relation and have his children *in potestate* and as his heirs. There were reasons in the nature of the patrician marriage itself for the substitution of the legal notion of property for the religious notion as the basis of the family and rights resulting from the family. The husband's authority over his wife, or the *manus*, was so closely akin to property right as to be readily expressed by the same term,² and the power which he exercised toward his children was at one time as complete as that over a slave.³ When the plebeian obtained the right of acquiring property *per æs et libram*, he could apply the same method to the acquirement of a property right, *manus*, in his wife: his children born of her were necessarily *in potestate*. By an easy analogy they received the same rights, *i. e.* in regard to succession, that the children of the patricians enjoyed. At about the same time and for similar reasons marriage by *usus* obtained the same stability and produced the same effects. For according to the XII. Tables, plebeian as well as patrician acquired, after a year's undisturbed possession,⁴ the highest kind of ownership, Quiritarian, in movables. By this application to marriage of notions derived from the law of property, the *confarreate* marriage was not disturbed. The legal, as distinguished from the religious results of marriage, were merely extended to unions hitherto without the law. These were *justæ nuptiæ* which, according to the stereotyped phrase preserved by Modestinus, were a *divini et humani juris communicatio*, but were henceforth lacking in the *jus divinum*.

A still further extension of the rights originally due to the

¹ Cf. Gai., i. 111.

² See *supra*.

³ Cf. Cicero, *De domo sua*, c. 29.

⁴ Cf. Gai., i. 111; ii. 54; Cicero, *Top.* 4.

religious organization of the family began to appear in its earliest form almost at the same time as the plebeian forms of marriage by *coemptio* and *usus*. This new form was connected with the *usus* marriage, at first possibly with that form which preceded the legal definition of the term for the *usucapio*. If after the XII. Tables marriage by *usus* required one year's undisturbed possession, or marital cohabitation, what was the relation during that year? What was the relation of child to father if born during that year? What would be the status of the parents and the children if that *usus* was prevented by the interruption of the marital possession? Such questions must have arisen very early, for by the XII. Tables the interruption sufficient to prevent the acquirement of the *manus* by the husband was fixed at three consecutive nights.¹ This provision of the decemviral code could hardly have been intended to encourage illicit unions. There were, it can be easily seen, several disadvantages connected with the *manus*. The wife wholly ceased to be a member of her father's family. Her property as well as herself passed completely into her husband's hands, or that of his *paterfamilias*. The authority of the husband was enormously increased and the continuation of the union after it had become distasteful depended upon his will alone. A union in which the *manus* was not acquired because a year had not elapsed, or the *usus* had been interrupted, was a sort of marriage still. It was neither *stuprum* nor concubinage. But for a long time, at least, the children born in it were not *in potestate* and consequently had not Quiritarian rights of succession.²

A similar difficulty arose in connection with marriages between those who did not have the legal rights of Roman citizens and so could not employ even the forms of marriage based upon the legal notions of ownership and sale. Here there was no *patria potestas*, for that was a right peculiar to Roman citizens. In the same way there could be no *manus*, for that too was a *jus proprium civium*

¹ Gai., i. 111; cf. Gell., iii. 2, 13.

² Cf. Karlowa, Die Formen der römischen Ehe und Manus. Bonn, 1868, p. 71. The *potestas* depended upon the *justæ nuptiæ*. The latter in turn upon the *connubium* or right of intermarriage. Cf. Gai., i. 56. It would therefore appear at first sight that *connubium* and not *manus* was the necessary condition of *justæ nuptiæ*. It was the one essential in the later law, but this was only after the consensual marriage had become the customary form. It would be a serious error to apply the condition of the law in the time of Gaius, when *manus* had all but disappeared, to marriage under the early Republic.

Romanorum.¹ Again, the same difficulty would arise when a Roman citizen married a non-Roman, or a peregrine with whom there happened to be no right of intermarriage. Children born of such marriages could not be *in potestate*,² although neither in this case nor in that of marriage between peregrines, nor in case of marriage between Romans without the acquirement of the *manus*, could they be regarded as *vulgo quæsit*i or *fili*i *nul*-*lius*. The solution of the problem presented by these unions lacking what had justified the plebeian marriage by *coemptio*, was found in the extension to marriage of another legal concept derived from commercial life, the concept of a contract as it appeared in the course of the law's development. And it is interesting to note in this connection that as a consensual contract was evolved through the *sponsio* and *nexum* from the conveyance *per æs et libram*, so a purely consensual marriage was evolved from the *coemptio* (the name itself implies some sort of mutuality), and ultimately from the same conveyance *per æs et libram*. The extension of the notion of contract to marriage, furthermore, was effected by the same means that developed the new law of contract, the prætorian jurisprudence. A marriage founded upon a mere agreement, when once protection was given to it, *e. g.* by an action for recovery of the *dos* or for adultery, became in essential points similar to a *manus* marriage in the same way that the protection given by the prætor to property in which the owner could not have Quiritarian ownership on account of his status, gave a title to the property of a value and importance equal to the best in the law. And again the rights flowing from a stricter form of marriage were applied to the new form. This free marriage was to enjoy all the benefits of a marriage with *manus* as to legitimacy of offspring. But this new form of marriage, the *communicatio juris humani*, almost disappeared. The wife was not a member of her husband's family, she was not his heir, not being *in loco filiæ*, and remained in the family in which she had been previous to the marriage. Yet the children born of that union were by an extension of the law the children not of their maternal grandfather but of their own father.

The result of this development of the law of marriage and legitimacy whereby the foundation upon which the *patria potestas* and the child's right of succession was changed to keep pace with advancing legal conceptions, was that henceforth in Roman Law

¹ Gai., i. 108.

² *Ibid.*, 77.

marriage founded upon a mere agreement was *justæ nuptiæ* and as such sufficient to produce in the case of Roman citizens the *patria potestas* and eventually, when all free persons became Roman citizens, all children born of *justæ nuptiæ* were *filiifamilias*, i. e. were heirs to their father or legitimate. It therefore follows that *pater*, in the sense of one having the *potestas*, *est quem nuptiæ demonstrant*.

The legal conception of legitimacy that took form in the Roman Empire is substantially that obtaining in all modern jurisprudence, for it was admirably adapted by its simplicity to become a universal law. It avoided, on the one hand, the uncertainty of the Semitic system as represented by Hebrew law, in which paternity was always the essential principle, not the existence of a marriage;¹ and on the other hand, the extreme technicality of the Egyptian system, in which the succession was secured to the wife's son by the marriage settlement.² But it would be a mistake to conclude that because the Roman connection between legitimacy and birth in lawful marriage has been generally accepted, this has been wholly due to its place in the Civil Law, or that the modern and the Roman notions of legitimacy are based upon identical fundamental ideas. There has intervened between the Civil Law and the systems of modern jurisprudence another legal system which has profoundly influenced certain parts of the law and notably the law of marriage and legitimacy. For by the system of the *Corpus Juris Canonici* the point of view has been materially changed and another foundation laid in place of that which the ingenuity of the Roman lawyers had carefully removed.

The theory of marriage and legitimacy developed by Roman Law had been so completely emptied of its religious significance and so easily expressed in terms derived from the law of property and contract, that it was accepted without the least scruple by the Christian Church.³ The new religion could regard the moral aspects of marriage, and without coming into conflict with secular law, could regulate the marriages of its own adherents according to its own principles. The Church, even before it had any clear idea of what constituted the sacramentality of marriage, held that marriage was a divine ordinance instituted in Paradise *ad officium*, and as such *proles* was an end of marriage, one of the *tria bona*;

¹ Cf. Benziger, l. c. Mutterrecht prevailed in some Semitic tribes; cf. W. Robertson Smith, Kinship and Marriage in Early Arabia.

² Cf. Revillout, Cours de droit égyptien, p. 41 ff.

³ Cf. e. g. c. 12, C. 32, qu. 2; c. 15, C. 32, qu. 4; c. un. C. 35, qu. 7.

it was also instituted *ad remedium* and any extra matrimonial relation was deadly sin.¹ Two results followed: first, the Church could not tolerate the legally recognized concubinage except so far as it approximated marriage;² secondly, the Church would be forced sooner or later to recognize the *contubernium* of slaves as equivalent morally, or in the eyes of the Church, to the marriage of free persons.³ Of course the Church could give no legal rights to the offspring of such slave marriages. But it could demand, by spiritual sanctions, the permanency and inviolability of such unions. To these results the Church came, it is true, only after many differences of opinion and much inconsistent legislation, but the principles underlying them are bound up with the teaching of the Church from the very first. Of the two results, the latter was much the more important, for it eventually gave the Church the notion of a perfectly valid marriage without reference to the civil effects which might result from the marriage in respect to the children. By this the Church was able to bring under one principle not only the general rule that only children born of a valid marriage are legitimate, but also the exception to that rule arising from a putative marriage; not only the legitimation by subsequent marriage, but also the exceptions to that rule in the case of *incestuosi* and *adulterini*.

The distinction between a valid marriage, as an indissoluble and inviolable relation, and a marriage that in addition rendered the children born of that union legitimate, was made on a large scale in connection with the Teutonic law of marriage, which in some respects was strikingly like the early Roman law. If marriage was to produce legitimacy, it had to be accompanied by the acquirement of the *mundium*, a tutorial authority corresponding to the *manus* and *potestas* of the Romans. As only the *ingenui*, or free persons, could hold the *mundium*, they alone had "full marriage," as that union has been well called which produced the full effects customary to marriage in the Civil Law. But in the various Barbarian Codes and the secular legislation of the period during which the Canon Law gradually assumed its form, two important modifications appear in this conception of marriage, both

¹ Cf. St. Augustine, c. 6, C. 32, qu. 2.

² Cf. c. 1, D. 33; c. 4, D. 34; c. 11, C. 32, qu. 2, etc. Cf. Penitentie Ecgberte, II. 9, Thorpe, Ancient Laws of England, II. 187, cf. 271.

³ Cf. Döllinger, Hyppolytus und Calistus, p. 158 ff. See, Ivo, Decret. VIII. 55. Migne, Patrologia Latina, vol. 161; c. 6, C. 29, qu. 2.

of which were in close agreement with the distinction which had been introduced by the ecclesiastically valid servile marriages. These modifications concerned marriages without the *mundium*, and marriages between others than *ingenui*. These modifications are closely connected in origin and development, and have found places in Gratian's theory of marriage. Their effect may be traced much further.

The *mundium* was not essential to a marriage. It was possible for a woman to marry without any contract for the *mundium*, and such a union was recognized by the law in nearly all the Barbarian Codes, *e. g.* among the Visigoths, Lombards, Thuringians, Franks, and Saxons.¹ In not a few contemporaneous documents and by many modern writers such unions have been called concubinage, because it resembled the latest form of the Roman *concubinatus*, but in the codes they are called marriage.² Children born of such marriages enjoyed a right of succession though limited, but they had other rights, some very considerable, as holding the *mundium* of sisters, born in another marriage.³ The regulation of matters connected with the *mundium* naturally occupies a large part of the space devoted to marriage in the codes, in much the same way as the title "Husband and Wife" is to-day almost entirely a discussion of property rights. But the marriage without *mundium* was always possible, although the more advantageous form was with *mundium*, the contract for the acquirement of which was the betrothal.⁴

Both forms of marriage appear in Gratian's discussion of marriage. The marriage with *mundium*, or that preceded by betrothal, is the form he has in mind in Causa XXVII., *quæstio* 2, when he makes the distinction between *matrimonium initiatum* and *matrimonium perfectum*, the former effected by the *desponsatio*, the latter by the subsequent *copula*.⁵ But how far Gratian was from

¹ Cf. Sohm, *Das Recht der Eheschliessung*, p. 51.

² Lex Rip. 35, 3; Lex Sax. 40 ff; Ed. Roth. 188; Liutpr. 119; Lex Fris. ix. 11; Lex Visig. iii. 2, 8; Lex Alam. Hloth. c. 52, c. 54. The *matrimonium ad morganaticum* which is generally connected with the *Libri Feudorum* (II. 26, 5) is more properly connected with the marriage without *mundium*, and is in fact an outgrowth of it. Cf. Freisen, *Das Canonische Eherecht*, p. 55 f.

³ Cf. Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, 1898, p. 302.

⁴ Cf. Habicht, *Altdeutsche Verlobung*, p. 9, 24; v. Scheurl, *Eheschliessung*, p. 112. It should be borne in mind that *mundium* was one thing and the marriage relation something entirely different.

⁵ Cf. Dict. ad c. 34, C. 27, qu. 2.

regarding only such marriages as valid is shown by his treatment of marriages lacking the usual formalities. In respect to them he made a distinction between *matrimonium legitimum*, or marriage according to the requirements of the secular law, *i. e.* with betrothal, and *matrimonium ratum*, marriage that was indissoluble, *i. e.* a sacrament. A marriage might be *ratum* and not *legitimum*, because contracted *solo affectu*; on the other hand, a marriage, among *infideles*, might be *legitimum* and not *ratum*.¹ The practical discussion of this is taken up in various places, but especially in connection with clandestine marriage, *i. e.* marriage without betrothal and without witnesses. Although for many reasons such a union ought not to take place, yet it was a valid marriage, and should either party marry again during the lifetime of the other he was guilty of adultery.²

In respect to marriage between different classes in the community, the laws and canons again came to much the same result. Here various cases might arise: *e. g.* a marriage between an *ingenuus* and an *ancilla*, his own or another's; between an *ingenua* and a *servus*, either her own or another's; between an *aldus* and an *ancilla*. In some of these cases, serious disadvantages attended the union³ unless they were avoided by special provisions.⁴ But they were all regarded as marriage and so described in the law; and the wife, whatever her condition, was styled *uxor*. Although some question arose as to the ecclesiastical validity of these marriages, Gratian's conclusion was followed by the Church. It mattered not whether the free person was the husband⁵ or the wife,⁶ provided that the free party to the marriage knew the servile condition of the other at the time of the marriage, or, learning it after marriage, had not waived the right of impeaching the marriage by continuing the marital relation. In regard to the marriage of slaves, the early tendency of the Church came at length to a definite termination. Taking his stand upon the broad basis of the equality of all before God and the amenability of all to the same

¹ Cf. Dict. ad c. 17, C. 28, qu. 1.

² Cf. Dict. ad c. 11, C. 30, qu. 5.

³ Cf., *e. g.*, Lex. Sal. 13, 9; 25, 6: see C. Koehne, Die Geschlechtsverbindungen der Unfreien in fränkischen Reich, Breslau, 1888.

⁴ *E. g.* by *epistolæ conculcatoriæ*; see Rozière, Recueil général de formules usitées dans l'empire des Francs, n. 101 ff., 109.

⁵ c. 2, C. 29, qu. 2.

⁶ c. 5, qu. cit.

law, Gratian¹ proves not only that slaves might marry, but that even if they belonged to different persons their marriage was indissoluble. But the condition on which they might marry was the consent of their respective masters.² What their status would have been without that consent is not clear, for the canon of the Council of Châlons (A. D. 813), on which Gratian here relies, is directed against the *domini* rather than against the *servi*. But the tendency of the law was toward making the marriage indissoluble irrespective of the will of the *dominus*, *i. e. matrimonium ratum*,³ and Adrian IV. (A. D. 1154-1159) soon after declared the consent of the *dominus* wholly unessential.⁴ This opinion after some hesitation was received⁵ and became law. The recognition of the unconditional validity of the marriage of slaves, a matter which had fallen to the ecclesiastical jurisdiction, was due to the theological treatment of the whole subject of marriage and the new theory of the sacraments. Marriage was looked at principally from the point of view of a sacrament, and as such wholly independent of conditions introduced by secular law.⁶

When the Church recognized the validity of marriage contracted by mere consent and without reference to the civil status of the parties, it did not touch the matter of legitimacy or give any rights of succession to children born of such unions. That was a matter of secular law, and consequently Gratian mentions legitimacy only incidentally. But in the course of the long struggle over clerical marriage, the Church created for herself a species of legitimacy, *quoad spiritualia*, which was entirely within its competency. By a canon of the Council of Poitiers (A. D. 1078)⁷ birth in a valid marriage was necessary for preferment to any ecclesiastical benefice or

¹ c. 1, qu. cit.

² c. 8, qu. cit.

³ Cf. Pet. Lomb. Sent. IV. D. 36, written at almost the same time as Gratian's Decretum.

⁴ c. 1, X. 4, 9, Jaffé, n. 7068.

⁵ Bernardus Papiensis includes this decretal in his *Compilatio Prima*; cf. his *Summa Decretalium*, ed. Laspeyres, p. 154, and his *Summa de matrimonio*, printed as an appendix to the *Summa Decretalium*, p. 294.

⁶ In the words of Adrian, "*Sane iusta verbum apostoli sicut in Christo Jesu, neque liber neque servus est qui a sacramentis ecclesiæ sit removendus, ita quoque nec inter servos matrimonia debent ullatenus prohiberi.*" A somewhat different line of argument and even more in harmony with the theological method of the time is given by Paucapalea (*Summa*, ed. Schulte, p. 119), "*Valde majus atque dignius est conjugium Christi et ecclesiæ, quam viri et mulieris matrimonium. A tali vero conjugio neminem repellit servilis conditio.*"

⁷ c. 1, X. 1, 17.

even for ordination except in the case of regulars.¹ In this way the incontinent clergy were to be punished by making a new disability arise from bastardy, and the danger of converting ecclesiastical benefices into family property was to be prevented. For the son might not succeed his father in the same benefice.² Having a species of legitimacy of its own, and possessing everywhere jurisdiction in matrimonial causes,³ with which legitimacy was closely connected, there was always a tendency to extend the ecclesiastical jurisdiction to matters purely secular. A new title appeared in the *Compilatio Prima*,⁴ "*Qui filii sint legitimi*," and reappeared in subsequent private and official collections. The reasoning was very natural; since *spiritualia* were superior to *temporalia*, *legimitas quoad spiritualia*, which certainly belonged to the Church to determine, ought to include *legimitas quoad temporalia*,⁵ and papal legislation be as binding in one case as the other. Then again, in as much as the validity of a marriage in case of an impediment depended on an ecclesiastical dispensation, and legitimacy in the secular law was confessedly the result of birth in a valid marriage, except in the case of the children of slaves,⁶ it was not unnatural to claim authority in matters of legitimacy⁷ as much as in matters of marriage.⁸

The theory of legitimacy which underlies the Canon Law and the ecclesiastical legislation appears clearly in the origin of the legitimacy *quoad spiritualia*. It was in the interest of morals that the children born of a valid marriage should have privileges denied children born of illicit unions. Parents were to be punished in their children's disabilities more effectively than in themselves.⁹

¹ The *defectus natalium legitimorum* was originally only a special case of *defectus famæ*. It had appeared earlier (*cf.* Regino, *De synodalibus causis*, I. 427-429; Migne *Patrol. Lat.*, vol. 132), but it produced at the time no great effect upon the law of the Church.

² *Cf.* cc. 2-4, 7-13, X. i, 17.

³ *Cf.* Esmein, *Le mariage en droit canonique*, I. p. 25 ff.

⁴ *Cf.* *Quinque compilationes antiquæ*, ed. Friedberg, p. 51.

⁵ *Cf.* c. 13 X. 4, 17.

⁶ Here the illegitimacy was both *quoad spiritualia* and *temporalia*. *Cf.* Hostiensis, *op. cit.* p. 1094. This apparent inconsistency in the Canon Law was probably due to the old principle that prevented the ordination of slaves (*cf.* Dist. 54; X. *de servis non ordinandis*, I, 18).

⁷ c. 5, 7, X. 4, 17.

⁸ For the opinion current among pre-Reformation English ecclesiastical lawyers as to the relation between secular and ecclesiastical legislation, see Lyndwood, *Provinciale*, p. 257, gl. ad v. *canones præcipiunt*.

⁹ Hostiensis, *op. cit.* ad X. i. 17, p. 180, *magis puniuntur parentes in filiis, quam in semet ipsis*. Hostiensis finds precedents for this theory of legitimacy in C. 9, 8, 5, 1; 1,

In the case of illegitimacy *quoad spiritualia* there were additional reasons, *timor paternæ incontinentiæ*¹ and the dignity of the priesthood.² But these reasons merely enforce the point that legitimacy was a privilege arbitrarily attached to a valid marriage, for a reason not found in the mere idea of marriage. And as it appears in the case of putative marriage that reason, except in the wholly special case of *fili presbyterorum*, was wholly the interest in morality which the Church naturally took. Another theory appears in the course of the speculations of the canonists, that because the husband is the *dominus ventris*, therefore his children are they who are born of his wife.³ But this theory does not appear to have had the slightest influence upon the actual legislation of the Church and is no more than one of the many speculations as to the ground of the law.

As a consequence of the principle that legitimacy is primarily an encouragement to virtue, it followed that where there was no *dolus* there ought to be no punishment, and a marriage entered in good faith, but invalid on account of some impediment unknown to the parties, conferred legitimacy on the child born of the union or conceived before sentence of divorce was pronounced, provided the marriage had been contracted *in facie ecclesiæ* and with prescribed solemnities. The object of this proviso was to give the assurance of good faith. Banns were to be published⁴ to prevent incestuous or otherwise invalid unions.⁵ Any impediment was to be made known to the proper authorities. If the parties contracted without the banns, although the marriage was not rendered invalid by the mere omission, yet if it should be proved invalid, there was strong presumption of *mala fides*. Hence the rule, "*Legitimus filius est qui de legitimo matrimonio est natus, vel de eo quod in facie ecclesiæ legitimum reputatur, quamvis in veritate matrimonium non fuit.*"⁶ But the *bona fides* need not be present in the

5, 4, 6, and is followed by Panormitanus, *op. cit.* I. 55 b, and other canonists generally. Blackstone, 4 Comm. 382 f., reasons in much the same way in connection with forfeiture of property for treason and corruption of blood.

¹ Hostiensis, l. c., c. 14, X. 1, 17; Dict. ad c. 1, D. 56. Gratian relies upon this reason to remove the apparent injustice of the rule; cf. c. 3 ff.; D. 56.

² See *supra*. Cf. Rubr. c. 14, X. 5, 33.

³ Cf. Hostiensis, *op. cit.* p. 1097.

⁴ c. 3, X. 4, 3.

⁵ It should be borne in mind that *copula illicita* gave rise to affinity.

⁶ Tancred. *op. cit.* p. 104; Bernard. Pap., Summa decret. p. 182; cf. Roland. Summa, ed. Thaner, p. 231, f; c. 5, X. 4, 2; c. 3, X. 4, 3; c. 2, 15, X. 4, 17.

case of both parties, for it was sufficient according to the canons¹ that the woman act in good faith. The children so born were legitimate in respect to both parents. If they had been legitimate only in respect to the party acting in good faith, there would still be a partial illegitimacy. This rule for which a precedent had been found in the Civil Law² appeared first in the *Compilatio Tertia*³ and was soon extended to apply to either party, and merely carried further the principle on which legitimacy was based by the Church. The comment of Panormitanus illustrates this, for he notes that the *bona fides* must exist *tempore conceptionis filii*, and not merely *tempore contractus matrimonii*.⁴ For when once the impediment becomes known there is *in foro conscientæ*, at least, no marriage, and the relation for the person to whom the impediment is known at once becomes sin.⁵

If legitimacy is merely a privilege which the law attaches to a valid marriage or a putative marriage, for the sake of upholding morality, and is not founded upon some property right or connected with such, it is easy for the law to give the same privileges in other cases in which the cause of morality might be advanced. Such a case would arise if, for the sake of benefit to children, an illicit could be converted into a valid marriage. Hence, *legitimitas per subsequens matrimonium*. Here, as in so many other parts of the Canon Law, the legislation was not without precedents. What closely resembled this form of legitimation appeared not merely in the Civil Law but in the Barbarian Codes in the acquirement of the *mundium* after marriage with its consequent effects. It is, however, in the former system that the canonists found the legal justification for their rather broad interpretation. By that law only *liberi naturales, i. e.* children born of a lawful concubine, could be legitimated by subsequent marriage of parents, and special formalities were required in connection with the marriage. In the development of the law, the concubinate as an institution disappeared. The concubine became either a wife from whose marriage not all the civil rights of marriage resulted, or she was a mere mistress. But the former lived in a union that

¹ c. 14, X. 4, 17, cf. c. 8, eod. tit.

² D. 23, 2, 57 a.

³ Friedberg, *op. cit.* p. 128.

⁴ *Op. cit.* ad c. 14, X. 4, 17, IV. p. 44 b.

⁵ On putative marriage and legitimacy in England, cf. Bracton, *De legibus*, f. 63, who refers to Tancred and the Decretals; cf. Glanville vi. 17.

was the sacrament of marriage; the latter lived in fornication.¹ There was, therefore, no reason for making the distinction of the Civil Law whereby only certain children born *ex soluto et soluta*² might be legitimated. The concubinate derived no justification from its resembling marriage in that it was a more or less permanent relation, in fact, according to some it was, for that very reason, all the more reprehensible.³ It was, therefore, not going beyond the example set by the Civil Law, if the privilege of legitimation should be extended by canon to all born of an illicit union, provided that the only fault in the relation was the want of wedlock. But such a privilege should not be allowed in case of *spurii, incestuosi, or adulterini*. For this reason the decretal *Tanta est vis*⁴ expressly excepted such from its operation. The principle according to which this exception was made, *quoniam matrimonium legitimum inter se contrahere non potuerunt*, was omitted by Raymund of Pennafort in his revision of the decretals. It has, nevertheless, played a very important part in all canonical discussions.

The decretal *Tanta est vis* introduced no new principle of legitimation, but merely excluded *adulterini* from the benefits of the law. The Church in making this exclusion was entirely within its own right so far as *legitimitas quoad spiritualia*. But no limitation appears in the decretal referred to. Legitimacy is there taken quite generally as if there was no distinction between the two kinds. But when the Church appears in its own authority insisting that legitimation by subsequent marriage was valid *quoad hereditatem*,⁵ there is the appearance of opposition to what was at least becoming law, if not already such.

A conflict with the temporal authorities was inevitable wherever the law of legitimacy had been changed from the older form.⁶ In England where this was the case and the change in the law had taken place about the time of the decretal *Tanta est vis*,⁷ the result was

¹ Cf. c. 6, X. 1, 21; St. Thom. Aq. Summa Theol., Suppl. qu. 65, art. 3.

² Cf. Rubr. c. 1, X. 4, 17.

³ Cf. Panormitanus, IV. p. 40 b.

⁴ C. 6, X. 4, 17.

⁵ C. 1, X. eod. tit., A. D. 1180.

⁶ Cf. Schröder, *op. cit.* p. 61, 694; Selden, Diss. ad Fletam, p. 538.

⁷ Cf. the correspondence between Grosseteste and William de Raleigh. Rer. Brit. Scr., vol. 25, p. 89, 96. See also Libri Feudorum, II. 26, § 4, in which this form of legitimation is disallowed. The date of this portion of the Libri Feudorum, according to Laspeyres, Über die Entstehung und Älteste Bearbeitung der Libri Feudorum,

the Statute of Merton,¹ by which the change in the English law was made permanent in opposition to the Church.² That the law of the Church continued to be followed by the Church's courts is certain, not merely from the fact that the difficulty with these courts continued in spite of the Statute of Merton, and only ended by taking from the Church's courts the possibility of applying their law,³ but also from the testimony of Bracton⁴ and of Coke.⁵ Only legitimacy *quoad spiritualia* was left to the decision of the Church's Courts; there the ecclesiastical law was still applied.⁶

Why was there this opposition to legitimacy based upon a subsequent marriage? Was there a new theory of legitimacy? It does not seem to be so explained. The rejection of this form of legitimation seems to have been due to a question of prudence, and should be taken with the hesitation to recognize the legitimacy of the offspring of clandestine marriages.⁷ It was not because such marriages were not valid, for of that the King's Courts had nothing to say. Marriage was a sacrament, and it belonged to the Church to say when the conditions of a sacrament were present. But such marriages were altogether uncertain. In the same way not a few legitimations by subsequent marriage were on deathbeds, under circumstances involving suspicion. To avoid all dispute, the courts cut off the whole class of doubtful marriages as giving rise to legitimacy. But there was no new theory of

Berlin, 1830, p. 200 ff., is about 1160. The decretal *Tanta est vis* (A. D. 1172) is addressed to the Bishop of Exeter, and therefore there may be special connection with the change in the English law.

¹ 20 Henry III. (1235-6) c. 8.

² The well-known account of the Statute of Merton has been repeated in almost every discussion on legitimacy or the place of the Canon Law in England, to show that the Canon Law was not binding in England, or not binding *proprio vigore*. It merely shows that in the King's Courts it was not recognized in all its parts. But it says nothing as to its force in the Ecclesiastical Courts where it was administered. A line of reasoning similar to that generally based upon the Statute of Merton would show that the Canon Law was nowhere in Europe in force *proprio vigore*, except in the Patrimony of St. Peter.

³ Cf. Bracton, *op. cit.* 416, a, f; Fleta, vi. 16.

⁴ *Op. cit.* f. 62.

⁵ Coke on Littleton, p. 245. *Matrimonium subsequens legitimus facit quoad sacerdotium non quoad successionem propter consuetudinem regni quod se habet in contrarium.*

⁶ In Germany the legitimation *per subsequens matrimonium* met with some opposition (cf. Schwabenspiegel, c. 377; Sachsenspiegel, I. 27), due, as in England, to the new feudal law. But here, as probably everywhere else except in England, it eventually prevailed.

⁷ Cf. Bracton, *op. cit.* 92 a, *non valeant clandestina conjugia haeredibus quoad successionem.*

legitimacy in this, any more than there was of marriage.¹ The theory that still underlay the law, secular as well as ecclesiastical, was the moral advantages arising from conferring benefits upon the offspring of marriage. The extreme to which the Common Law carried the principle that marriage should precede birth, even by ever so short an interval, is the result of this very theory, and may be regarded as a sort of compromise between what was felt to be natural justice and what the jealousy of the Church's law prompted.

It is interesting to observe that in those points in which the English Common Law long refused to accept the more equitable provisions of the Canon Law, the law of other English-speaking countries, notably the United States, has by statute carried even further, in not a few instances, the principles of the Canon Law.

Joseph Cullen Ayer, Jr.

SANDWICH, MASS., September, 1902.

¹ Cf. Pollock and Maitland, *Hist. of English Law*, II. p. 372 ff.